MOTION FILED
NOV 20 1986

(1) (3)

Nos. 85-2156 & 85-2169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,
v.
JOHN WILLIAM COBB, *et al.*,
Respondents.

SAINT FRANCIS COLLEGE, *et al.*,
Petitioners,
v.
MAJID GHAIDAN AL-KHAZRAJI,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Third Circuits

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN JEWISH COMMITTEE, THE AMERICAN CIVIL LIBERTIES UNION, THE INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS, THE JEWISH WAR VETERANS, THE INSTITUTE OF JEWISH LAW, AND THE CAPITAL LEGAL COUNCIL OF B'NAI B'RITH AS AMICI CURIAE SUPPORTING PETITIONERS SHAARE TEFILA CONGREGATION, ET AL., AND RESPONDENT MAJID GHAIDAN AL-KHAZRAJI

GREGG H. LEVY *
MITCHELL F. DOLIN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000
Counsel for Amici Curiae

* Counsel of Record

(Additional Counsel Listed on Inside Cover)

November 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Of Counsel:

MICHAEL SCHULTZ
MEYER EISENBERG
DAVID BRODY
EDWARD N. LEAVY
STEVEN M. FREEMAN
JILL L. KAHN
ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH
823 United Nations Plaza
New York, New York 10017
(212) 490-2525
and
1640 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 857-6660

MENACHEM Z. ROSENSAFT
INTERNATIONAL NETWORK
OF CHILDREN OF JEWISH
HOLOCAUST SURVIVORS
425 Park Avenue
New York, New York 10022
(212) 407-8000

ROBERT S. RIFKIND
SAMUEL RABINOVE
RICHARD T. FOLTIN
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, New York 10002
(212) 751-4000

EILEEN KAUFMAN
INSTITUTE OF
JEWISH LAW
300 Nassau Road
Huntington, New York 11743
(516) 421-2244

HAROLD R. TYLER
JAMES ROBERTSON
NORMAN REDLICH
WILLIAM L. ROBINSON
JUDITH A. WINSTON
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

RACHAEL PINE
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

JOSEPH A. MORRIS
CAPITAL LEGAL COUNCIL
OF B'NAI B'RITH
5500 Friendship Boulevard
Chevy Chase, Maryland 20815

GROVER G. HANKINS
JOYCE H. KNOX
NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF
COLORED PEOPLE
4805 Mount Hope Drive
Baltimore, Maryland 21215
(301) 358-8900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 85-2156 & 85-2169

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

SAINT FRANCIS COLLEGE, *et al.*,
Petitioners,

v.

MAJID GHAIDAN AL-KHAZRAJI,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Third Circuits

---

MOTION OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN JEWISH COMMITTEE, THE AMERICAN CIVIL LIBERTIES UNION, THE INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS, THE JEWISH WAR VETERANS, THE INSTITUTE OF JEWISH LAW, AND THE CAPITAL LEGAL COUNCIL OF B'NAI B'RITH FOR LEAVE TO FILE A BRIEF AMICI CURIAE

The Anti-Defamation League of B'nai B'rith, the National Association for the Advancement of Colored People, the American Jewish Committee, the American Civil Liberties Union, the International Network of Children of Jewish Holocaust Survivors, the American Gathering and Federation of Jewish Holocaust Survivors, the Jewish War Veterans, the Institute of Jewish Law, and the Capital Legal Council of B'nai B'rith, pursuant to Rule 36.3, hereby move for leave to file the attached brief *amici curiae* supporting the petitioners in *Shaare Tefila Congregation* v. *Cobb*, No. 85-2156, and the respondent in *Saint Francis College v. Al-Khazraji*, No. 85-2169. Consent to file this brief has been obtained from counsel for all parties to No. 85-2169; letters expressing that consent have been lodged with the Clerk of the Court. With respect to No. 85-2156, consent to file the brief has been obtained from all of the petitioners and from the only respondent who has entered an appearance in this Court; letters expressing such consent have been filed with the Clerk of this Court. Because the *amici* have been unable to obtain consent from the remaining respondents in No. 85-2156, most of whom could not be located, this motion is necessary.

The background and concerns of the *amici* are fully set forth in the Interest of *Amici Curiae* section of the attached brief. In sum, the Anti-Defamation League, the NAACP, the Lawyers' Committee for Civil Rights Under Law, the American Jewish Committee, and the American Civil Liberties Union have sought for several decades to promote good will and mutual understanding among all Americans and to combat racial and religious prejudice in the United States. Over the years, each organization has appeared frequently before this Court as *amicus curiae* to advance constructions of the constitution and federal civil rights laws that would ensure appropriate federal remedies for victims of racial, religious, and other forms of discrimination. The International Network and the American Gathering are organizations of Jewish

survivors of the Nazi holocaust and their children. The Jewish War Veterans is comprised of Jewish individuals who have served in the American armed forces. The Institute of Jewish Law is concerned with research and scholarship in the field of Jewish legal studies. The Capital Legal Council of B'nai B'rith is comprised of Jewish members of the bench, bar, and related professions.

The *amici* believe that this Court should confirm the rule of law that extends to Arabs, Jews, and other minority and ethnic group members the remedies provided in section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982. The *amici* organizations and their members bring to the issues raised in this case perspectives and experiences that are broader than and different from those of the parties. On October 6, 1986, many of these *amici* were granted leave to file a brief, and did file a brief, urging that *certiorari* be granted in No. 85-2156. The *amici* now respectfully seek the Court's leave to file the attached brief on the merits.

Respectfully submitted,

GREGG H. LEVY *
MITCHELL F. DOLIN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000
Counsel for Amici Curiae

* Counsel of Record

Of Counsel:

MICHAEL SCHULTZ
MEYER EISENBERG
DAVID BRODY
EDWARD N. LEAVY
STEVEN M. FREEMAN
JILL L. KAHN
ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH
823 United Nations Plaza
New York, New York 10017
(212) 490-2525
and
1640 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 857-6660

MENACHEM Z. ROSENSAFT
INTERNATIONAL NETWORK
OF CHILDREN OF JEWISH
HOLOCAUST SURVIVORS
425 Park Avenue
New York, New York 10022
(212) 407-8000

ROBERT S RIFKIND
SAMUEL RABINOVE
RICHARD T. FOLTIN
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, New York 10002
(212) 751-4000

EILEEN KAUFMAN
INSTITUTE OF
JEWISH LAW
300 Nassau Road
Huntington, New York 11743
(516) 421-2244

November 1986

HAROLD R. TYLER
JAMES ROBERTSON
NORMAN REDLICH
WILLIAM L. ROBINSON
JUDITH A. WINSTON
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

RACHAEL PINE
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

JOSEPH A. MORRIS
CAPITAL LEGAL COUNCIL
OF B'NAI B'RITH
5500 Friendship Boulevard
Chevy Chase, Maryland 20815

GROVER G. HANKINS
JOYCE H. KNOX
NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF
COLORED PEOPLE
4805 Mount Hope Drive
Baltimore, Maryland 21215
(301) 358-8900

QUESTION PRESENTED

Whether Arabs, Jews, and other minority group members who do not belong to distinct "non-white races," but who are the victims of racially-motivated discrimination, are entitled to seek relief under section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982.

TABLE OF CONTENTS

	Page
MOTION OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, ET AL., FOR LEAVE TO FILE A BRIEF AMICI CURIAE	i
QUESTION PRESENTED	v
TABLE OF CONTENTS	vii
TABLE OF AUTHORITIES	viii
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Language and Legislative History of the Civil Rights Act of 1866 Confirm That the Statute Protects White and Non-White Minority and Ethnic Group Victims of Racially-Motivated Discrimination	6
A. The Racial Character of the Discrimination Rather Than the Racial Status of the Plaintiff is the Focus of the Statute	7
B. The Statute Was Intended to be Construed Broadly and to Protect Minority and Ethnic Group Members Regardless of Whether They Belong to Distinct Non-White Races	10
II. Federal Remedies for Racially-Discriminatory Conduct Should Not be Limited by Narrow and Arbitrary Definitions of "Race"	13
III. Section 1981 and 1982 Plaintiffs Should be Permitted to Proceed With Their Claims Unless Their Allegations Are Clearly Inconsistent With the Possibility That They Were the Victims of Racial Discrimination	20
CONCLUSION	22

TABLE OF AUTHORITIES

Cases: Page

Alizadeh v. *Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986) 21
Bob Jones University v. *United States*, 461 U.S. 574 (1983) 3
Brown v. *Board of Education*, 347 U.S. 483 (1954) .. 3
City of Greenwood v. *Peacock*, 384 U.S. 808 (1966) 8
City of Memphis v. *Greene*, 451 U.S. 100 (1981) 10
Delaware State College v. *Ricks*, 449 U.S. 250 (1980) 21
Erebia v. *Chrysler Plastic Products Corp.*, 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 1197 (1986) 22
Ex parte Mohriez, 54 F. Supp. 941 (D. Mass. 1944) 19
Frank v. *Mangum*, 237 U.S. 309 (1915) 2
Georgia v. *Rachel*, 384 U.S. 780 (1966) 8
Hirabayashi v. *United States*, 320 U.S. 81 (1943) .. 18
In re Hassan, 48 F. Supp. 843 (E.D. Mich. 1942) 19
In re Mohan Singh, 257 F. 209 (S.D. Cal. 1919) 20
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) .. 3, 8, 10, 14
McDonald v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) 3, 6, 7, 8, 9, 10, 11
Manzanares v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979) 14, 22
Mayers v. *Ridley*, 465 F.2d 630 (D.C. Cir. 1972) 16
Morrison v. *California*, 291 U.S. 82 (1934) 13
Near v. *Minnesota*, 283 U.S. 697 (1931) 18
Ortiz v. *Bank of America*, 547 F. Supp. 550 (E.D. Cal. 1982) 11, 15, 17, 22
Ramos v. *Flagship International, Inc.*, 612 F. Supp. 148 (E.D.N.Y. 1985) 22
Runyon v. *McCrary*, 427 U.S. 160 (1976) 6
Shelley v. *Kraemer*, 334 U.S. 1 (1948) 3
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) 3, 9, 10
Tillman v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) 6, 8, 9

TABLE OF AUTHORITIES—Continued

Page

United States v. *Price*, 383 U.S. 787 (1966) 10
United States v. *Bhagat Singh Thind*, 261 U.S. 204 (1923) 13, 17, 20
Woods-Drake v. *Lundy*, 667 F.2d 1198 (5th Cir. 1982) 9

Statutes and Legislative Materials:

Civil Rights Act of 1866

42 U.S.C. § 1981 ..... *passim*
42 U.S.C. § 1982 ..... *passim*

Cong. Globe, 39th Cong., 1st Sess. (1866) 10, 11, 12

Miscellaneous:

G. Barton, *A Sketch of Semitic Origins* (1902) 16
J. Barzun, *Race: A Study in Superstition* (1965) 17
R. Benedict, *Race and Racism* (1942) 19
I. Berlin, *Against the Current: Essays in the History of Ideas* (1980) 18
Dickey, *Falling Out of Love with the Arabs*, NEWSWEEK, Aug. 25, 1986, at 44 16
G. Eliot, *Daniel Deronda* (1876) 18
T. Gossett, *Race: The History of An Idea in America* (1963) 15
Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975) 12, 17, 22
L. Hand, *The Spirit of Liberty* (3d ed. 1974) 18
B. Lewis, *Semites and Anti-Semites* (1986) 15, 16
S. Molnar, *Races, Types, and Ethnic Groups* (1975) 17
A. Montagu (ed.), *The Concept of Race* (1964) 14, 17
A. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* (5th ed. 1974) 18
Newell, *Arab Bashing in America*, NEWSWEEK, Jan. 20, 1986, at 21 16
Note, *Legal Definition of Race*, 3 RACE REL. L. REP. 571 (1958) 20

TABLE OF AUTHORITIES—Continued

Page

Note, *National Origin Discrimination Under Section 1981*, 51 FORDHAM L. REV. 919 (1983) 11, 22
M. Schappes (ed.), *A Documentary History of the Jews in the United States* (3d ed. 1971) 18
N. Webster, *An American Dictionary of the English Language* (C. Goodrich rev. Springfield, Mass. 1860) 12, 18
Webster's Third New International Dictionary (1981) 17, 18
J. Worcester, *A Universal and Critical Dictionary of the English Language* (Boston, Mass. 1874) .. 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 85-2156 & 85-2169

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

SAINT FRANCIS COLLEGE, *et al.*,
Petitioners,

v.

MAJID GHAIDAN AL-KHAZRAJI,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Third Circuits

---

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN JEWISH COMMITTEE, THE AMERICAN CIVIL LIBERTIES UNION, T INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS, THE JEWISH WAR VETERANS, THE INSTITUTE OF JEWISH LAW, AND THE CAPITAL LEGAL COUNCIL OF B'NAI B'RITH AS AMICI CURIAE SUPPORTING PETITIONERS SHAARE TEFILA CONGREGATION, ET AL., AND RESPONDENT MAJID GHAIDAN AL-KHAZRAJI

This brief is submitted on behalf of the Anti-Defamation League of B'nai B'rith, the National Association for the Advancement of Colored People, the Lawyers' Committee for Civil Rights Under Law, the American Jewish Committee, the American Civil Liberties Union, the International Network of Children of Jewish Holocaust Survivors, the American Gathering and Federation of Jewish Holocaust Survivors, the Jewish War Veterans, the Institute of Jewish Law, and the Capital Legal Council of B'nai B'rith in support of the petitioners in *Shaare Tefila Congregation* v. *Cobb*, No. 85-2156, and the respondent in *Saint Francis College* v. *Al-Khazraji*, No. 85-2169. The brief is being filed jointly in the two cases because they pose similar issues, as recognized by this Court's Order of October 6, 1986, setting their oral arguments in tandem.

INTEREST OF AMICI CURIAE

B'nai B'rith, which was founded in 1843, is the oldest civic service organization of Jews in this country. The Anti-Defamation League of B'nai B'rith was formed in 1913, partially in response to the virulent anti-Semitism surrounding the Atlanta trial of Leo Frank, *see Frank* v. *Mangum*, 237 U.S. 309, 349-50 (1915) (Holmes & Hughes, JJ., dissenting). Throughout its history, the Anti-Defamation League has sought, as its charter prescribes, "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." The Anti-Defamation League remains vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion, or ethnic origin.

In support of these objectives, the Anti-Defamation League has for several decades filed *amicus curiae* briefs in this and other courts. These briefs, including several

dealing with the statute at issue in this case, have, as appropriate, urged the unconstitutionality or illegality of racially-discriminatory laws and practices and the provision of appropriate federal remedies to victims of such discrimination. *See, e.g., Bob Jones University* v. *United States*, 461 U.S. 574 (1983); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Brown* v. *Board of Education*, 347 U.S. 483 (1964); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

The Anti-Defamation League's interest in these cases arises both from its general goals of promoting and securing tolerance and equal justice and from its history of fighting anti-Semitic hatred and violence. The Fourth Circuit decision in the *Shaare Tefila* case, if left standing, would deprive victims of anti-Semitic conduct of an important federal civil rights remedy. Moreover, the rule articulated in that decision would bar this essential remedy to members of many other minority or ethnic groups, including Arabs such as respondent in the *Saint Francis College* case. Accordingly, the Anti-Defamation League and the other *amici* appear to urge this Court clearly to hold that section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, protects all victims of racially-motivated discrimination.

The National Association for the Advancement of Colored People is a New York non-profit corporation. Among its principal aims are the promotion of equality of rights and the eradication of caste or race prejudice among the citizens of the United States.

The Lawyers' Committee for Civil Rights Under Law is a national civil rights organization that was formed in 1963 at the request of President Kennedy to provide legal representation to blacks who were being deprived of their civil rights. The Lawyers' Committee has been ac-

tive throughout its history in pursuing legal remedies on behalf of the victims of racial discrimination.

The American Jewish Committee is a national organization, founded in 1906 and dedicated to the preservation of civil rights and harmonious relations among Americans of different backgrounds. The Committee believes that the protection of civil rights for all best secures the rights of Jewish Americans.

The American Civil Liberties Union is a non-profit membership organization dedicated to protecting the fundamental rights of the people of the United States.

The International Network of Children of Jewish Holocaust Survivors, through affiliated groups in the United States, Canada, Israel, and Europe, represents five thousand sons and daughters of European Jews who survived the Nazi holocaust. The American Gathering and Federation of Jewish Holocaust Survivors is an umbrella organization representing the interests of tens of thousands of survivors of the holocaust living in the United States.

The Jewish War Veterans, founded in 1896, is the oldest active veterans' organization in the United States. It was established to oppose anti-Semitism and to call attention to the contributions of Jews to American military history.

The Institute of Jewish Law, an organization affiliated with Touro College Jacob D. Fuchsberg Law Center, was founded in 1980 to facilitate research and scholarship in the field of Jewish legal studies.

The Capital Legal Council of B'nai B'rith is a joint unit of B'nai B'rith and B'nai B'rith Women. Composed of Jewish members of the bench, bar, and related professions, it seeks to strengthen through study and advocacy those traditional Jewish precepts—the rule of law, the freedom and dignity of the individual, and the importance of religious freedom—that are at the core of the American experiment.

SUMMARY OF ARGUMENT

These cases present the issue of whether minority and ethnic group members who do not belong to distinct "non-white races," but who allege discrimination of a racial or racist character, are entitled to invoke section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982. In one case, a Jewish congregation's lawsuit seeking relief for the admittedly racist desecration of its synagogue was dismissed because Jews are not members of a distinct "non-white" race. *Shaare Tefila Congregation*, Pet. App. A, at 7a. In the other case, the lower court expressly rejected such a narrow construction of the statute and held that an Arab alleging racially-motivated discrimination, despite his taxonomic classification as a Caucasian, could state a cause of action under the statute. *Saint Francis College*, Pet. App. at 25a-27a. Presumably because of this clear conflict, the Court granted *certiorari* and has set the cases for argument in tandem.

The controlling precedents of this Court, the legislative history of the statute, and the plain realities of racial prejudice require that the Court confirm that the Civil Rights Act of 1866 protects all victims of racial discrimination. While this Reconstruction-era statute was intended principally to protect blacks from victimization by whites, this Court previously has removed any doubt that the Act protects whites and non-whites alike from discrimination that is racial in character. Accordingly, and notwithstanding their Caucasian racial status, Arab and Jewish victims alleging racially-motivated discrimination do in fact state claims under the Civil Rights Act of 1866. Unless the plantiff's allegations are inconsistent with the notion of racial discrimination broadly construed, the plaintiff is entitled to proceed to his or her proof and, if successful, to obtain the relief provided by sections 1981 and 1982.

ARGUMENT

I. The Language and Legislative History of the Civil Rights Act of 1866 Confirm That the Statute Protects White and Non-White Minority and Ethnic Group Victims of Racially-Motivated Discrimination.

Section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, extends to "all persons" various enumerated rights on the same terms as those rights are "enjoyed by white citizens."[1] Ten years ago, this Court held unambiguously that one need not be "non-white" to invoke the statute. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976). Prompted however by *McDonald*'s dictum that the statute deals with discrimination that is racial in character, *id.*, the lower federal courts, in the intervening years, have devised numerous and conflicting tests by which the statute's coverage is withheld from or extended to various groups that may not technically qualify as distinct "non-white races." The decisions of the courts of appeals in the cases below, involving Jewish and Arab plaintiffs, reflect at least two of the different and inconsistent approaches.

The decision of the Fourth Circuit in the *Shaare Tefila* case clearly conflicts with the statute and its legislative history. That decision would require a plaintiff to

---

[1] While respondent in *Saint Francis College* invoked section 1981, petitioners in *Shaare Tefila* sought relief under sections 1981 *and* 1982. Presumably because their section 1981 claim was dismissed on alternative grounds, including the one at issue here, petitioners in *Shaare Tefila* sought review only of the lower courts' disposition of their section 1982 claim. Recognizing the congruence of the statutory language, legislative history, and decided cases for purposes of resolving the question presented, this brief does not distinguish between the two sections. Sections 1981 and 1982 both originated in section 1 of the Civil Rights Act of 1866. Where, as here, the relevant language is the same in both statutes, there is "no reason to construe these sections differently." *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973); *accord*, *Runyon* v. *McCrary*, 427 U.S. 160, 171 (1976).

establish his membership in a distinct "non-white race" in order to invoke the Act. As the discussion below confirms, the language of the statute contains no such restriction, and instead was intended to protect all victims of discriminatory conduct of a racial or racist character; Congress clearly anticipated that such conduct would be actionable when directed at members of a wide array of minority or ethnic groups.

A. *The Racial Character of the Discrimination Rather Than the Racial Status of the Plaintiff is the Focus of the Statute.*

This Court's inquiry in the first instance should focus on the language of the statute. In sweeping terms, the Act's protections are afforded to "all persons." There are no words specifically limiting the class of intended beneficiaries to members of certain races, "white" or "non-white." Indeed, the word "race" does not appear in the statute as presently codified.

Despite the apparent breadth of the Act, the Fourth Circuit panel below affirmed the dismissal of petitioners' claims because Jews are not members of a "racially distinct group" that is "commonly considered to be non-white[]." *Shaare Tefila*, Pet. App. A, at 7a. The unarticulated rationale must have been that because Jews are "white," they cannot suffer discrimination cognizable under the statute at the hands of other whites. As the majority and concurring opinions of the Third Circuit panel in *Saint Francis College* demonstrate, the statute and this Court's prior constructions of the statute will not allow such a limited reading. Pet. App. at 23a-24a; *id.* at 31a-32a (Adams, J., concurring).

In *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court considered whether white persons alleging that they had suffered discrimination resulting from favoritism to blacks could invoke the

statute. Construing the same statutory language—"all persons" entitled to the same rights "enjoyed by white citizens"—the Court squarely held that one need not be "non-white" to state a claim under the statute. *Id.* at 287.

The Court in *McDonald* emphasized that "the statute explicity applies to '*all* persons' (emphasis added), including white persons." *Id.* (emphasis and parenthetical in original). The statute's qualifying phrase—"as is enjoyed by white citizens"—was designed not to limit the statute's applicability to non-whites, but rather "to emphasize the racial character of the rights being protected." *Id.* (quoting *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966)). *Rachel*, upon which the Court relied in *McDonald*, and its companion case, *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966), decided under the removal provisions of the 1866 Civil Rights Act, involved state criminal prosecutions of groups of civil rights workers. As in *McDonald*, the Court considered the nature of the conduct, not the race of the person alleging discrimination, in determining the availability of the federal remedy. *Rachel*, 384 U.S. at 791, 805.

This Court adopted precisely the same construction—one stressing the character of the rights being protected, rather than the "race" of the plaintiff—in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), where the Court pointed out that "*all* racially motivated deprivations of the rights enumerated in the statute" are covered. *Id.* at 426 (emphasis in original). Indeed, once one accepts *McDonald*'s holding that whites and non-whites alike can invoke the statute, racial *status* should become largely irrelevant; racial motivation and character should become the central issues. This conclusion is also supported by the consistent line of cases permitting a white associating with a black to seek relief under the statute for discriminatory conduct motivated by that association. *See Tillman* v. *Wheaton-Haven Recreation*

Ass'n, 410 U.S. 431, 434 (1973); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *Woods-Drake* v. *Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982). In such cases, the plaintiff's claim is based not on his or her racial status, but on the racial character of the rights protected.

The panel in *Shaare Tefila* disregarded the holdings of this Court and refused to consider the racial character of the conduct and rights involved. Instead, looking solely at the "race" of the plaintiffs, it held that since Jews are not "non-whites," no cause of action possibly could be stated. But given the uncontradicted admissions that the defendants in *Shaare Tefila* acted upon a belief that their Jewish victims belonged to a distinct and inferior non-white race,[2] a cause of action premised on the established racial character of defendants' conduct was stated under this Court's holding in *McDonald*.[3] As the panel in *Saint Francis College* recognized, the statute does not require a plaintiff to prove his "racial pedigree," but rather to allege that his membership in a distinct group has subjected him to "racially-based" prejudice. Pet. App. at 26a. This Court should reverse the Fourth Circuit's decision and reaffirm that neither the statute nor this Court's prior decisions require a section 1981 or 1982 plaintiff to establish membership in a distinct "non-white" race.

---

[2] *See Shaare Tefila*, Pet. App. A, at 12a-13a (Wilkinson, J., dissenting); Brief for Appellees at 5, *Shaare Tefila* v. *Cobb* (4th Cir. 1986).

[3] The "racial character" of alleged discrimination may be pleaded in a variety of ways, and could include allegations of racial animosity on the part of the defendants, plaintiff's membership in a group perceived to constitute a "race" or that is typically subject to prejudice with racial overtones, or by other assertions that suggest racial or racist conduct. The types of allegations that would satisfy a "racial character" requirement are explored more fully in Part III, *infra*.

B. *The Statute Was Intended to be Construed Broadly and to Protect Minority and Ethnic Group Members Regardless of Whether They Belong to Distinct Non-White Races.*

This Court has repeatedly emphasized that the Civil Rights Act of 1866 should be generously applied and it has insisted that " 'ingenious analytical instruments' . . . [not be employed] to carve . . . exception[s]" from the statute. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966)).[4] The *McDonald* Court rejected such an "analytical instrument" when it determined to emphasize the "racial character" of the rights and conduct involved, rather than the racial status of the plaintiff. In giving content to this concept of "racial character" and determining the rights Congress intended to protect under sections 1981 and 1982, the Act should be construed broadly. The propriety of such a broad construction is clearly justified by the legislative history of the statute, which demonstrates that the concept of "race" as understood and used by the 39th Congress was meant to encompass a far broader range of groups than just the "non-whites" protected by the Fourth Circuit below.

Introducing the Civil Rights Act of 1866, Senator Trumbull described the bill as intended "to protect all persons in the United States in their civil rights" and emphasized that it applied to "every race and color." Cong. Globe, 39th Cong., 1st Sess. 211 (1866). Representative Wilson, Chairman of the House Judiciary Committee and the bill's floor manager in the House, stressed that the measure would "protect our citizens, from the

---

[4] *See City of Memphis* v. *Greene*, 451 U.S. 100, 120 (1981) (statute's language to be "broadly construed"); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) ("narrow construction of the language . . . would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded").

highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." *Id.* at 1118.

While there can be no doubt that the Act was intended primarily to protect the rights of blacks, it is likewise clear that Congress did *not* intend to limit "race" by a color-based definition. In overriding President Johnson's veto of the Act, Congress reaffirmed that:

> "This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any *class or creed, or race or color*, but in the great future that awaits us will, if it become a law, *protect every citizen, including the millions of people of foreign birth who will flock to our shores* to become citizens and to find here a land of liberty and law."

Id. at 1833 (emphasis supplied). As this passage demonstrates, sections 1981 and 1982 were never intended by Congress to apply solely to non-whites, but rather, as the statute provides, to "all persons." [5]

The term "race," as used in the debates, was meant to be given a broad meaning so that it would encompass every "class or creed, or race or color." *Id.* This broad meaning is evident in Representative Shallabarger's statement:

---

[5] In an extended analysis of the statute's legislative history, this Court observed in *McDonald* that the Act "was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as non-whites." 427 U.S. at 289. After examining the background of the statute's enactment, one district court recently concluded that "the legislative history indicates that (perhaps except for distinctions based on gender and age) Congress intended to ensure that all citizens were to enjoy the same civil rights." *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 555 (E.D. Cal. 1982); *see also* Note, *National Origin Discrimination Under Section 1981*, 51 FORDHAM L. REV. 919, 934 & n.104 (1983) (indicating that Congress intended gender and age to be the only limitations on the statute's scope).

> "Who will say that Ohio can pass a law enacting that no man of the German race, and whom the United States has made a citizen of the United States, shall ever own any property in Ohio . . . . If Ohio may pass such a law, and exclude a German citizen . . . because he is of the German nationality or race, then . . . you have the spectacle of an American citizen admitted to all its high privileges and entitled to the protection of his Government . . . and yet that citizen is not entitled to either contract, inherit, own property, work, or live upon a single spot of the Republic, nor to breathe its air."

Id. at 1294; *see also id.* at 1757 (noting President Johnson's objection that the bill would make citizens of "Chinese and Gypsies").

The legislative history of the statute, including the generalized comments in that history about members of different "races," must also be read in light of the common understanding of the term "race" at the time.[6] A leading contemporary dictionary defined "race" as follows: "A race is the series of descendants indefinitely. Thus all mankind are called the *race* of Adam; the Israelites are of the *race* of Abraham and Jacob." N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) (emphasis in original). This sweeping contemporaneous understanding of "race" confirms that all types of groups were intended to benefit from the Act.

This Court should embrace that common and broad understanding of "race," not only because it conforms to the legislative history context, but because it is the correct and traditional method of interpreting the statute. In addressing the meaning of racial terminology, this Court has previously noted:

---

[6] At least one of the opponents of the Act noted during floor debate the imprecise and potentially boundless meaning of "race." *See* Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 672 (1975).

> "It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken."

United States v. *Bhagat Singh Thind*, 261 U.S. 204, 209 (1923); *see also Morrison* v. *California*, 291 U.S. 82, 85-86 (1934). Against this background, the legislative history demonstrates that any "scientific" limitation of the Act to distinct "non-white races" would be ill-founded.

The Civil Rights Act of 1866 was adopted against the background of sectional conflict by men who had seen the Nation's future threatened by issues of race and status. They were determined that, henceforth, "all persons" would be relieved of disabilities and harm by reason of any involuntary status attributed to ancestry, physiognomy, or ethnicity. Knowing well the dangers of group antagonism, they sought safety for the Nation by declaring that no American could be treated as an alien subject to intimidation, suppression, or expulsion from the civic community. The Civil Rights Act of 1866 must be read to have a reach as broad as this purpose.

II. Federal Remedies for Racially-Discriminatory Conduct Should Not be Limited by Narrow and Arbitrary Definitions of "Race."

The Fourth Circuit panel below—despite the uncontradicted evidence of the racist character of the synagogue desecration—dismissed petitioners' claims because Jews do not belong to a distinct "non-white" race. *Shaare Tefila*, Pet. App. A, at 7a. The panel determined that the defendants' belief that Jews are members of a

separate and inferior "race" was unfounded and hence held that their conduct could not be actionable as racial discrimination. In essence, the lower court purported to "excuse" defendants' admitted racism because defendants' racist conduct lacked a sound scientific basis. Such a narrow interpretation of the statute's scope both ignores the true character of racism and illustrates the inappropriateness of restrictive judicial definitions of race.[7]

Judge Seth, in considering the applicability of the statute to minority groups, aptly observed that racists are "poor anthropologists" and that racial "[p]rejudice . . . . is based on all the mistaken concepts of 'race.'" *Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979); *see also Shaare Tefila*, Pet. App. A, at 11a (Wilkinson, J., dissenting); S. Washburn, *The Study of Race*, in *The Concept of Race* 243, 254 (A. Montagu ed. 1964). This connection between misbegotten notions of race and racial prejudice is a commonplace. But such misbegotten notions must not be ignored if the statute is to apply to "*all* racially motivated deprivations of . . . rights," *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (emphasis in original).

On the theory that defendants' "subjective, irrational perceptions" that Jews are a race should not be controlling, the Fourth Circuit panel below refused to permit the plaintiffs to invoke the statute. *Shaare Tefila*, Pet. App. A, at 7a. This holding not only clashes with this Court's recognition that the statute applies to "*all* racially motivated" conduct; it also ignores the fact that anti-Semitism has long been the product of such racial misperceptions. The racist motivations of defendants in

---

[7] The *amici* reject the notion that Arabs or Jews should be classified as members of a distinct "race," but, as made clear throughout this brief, submit that the statute must be construed to cover acts of racism against Arabs and Jews.

Shaare Tefila are similar to the motivations that have animated anti-Semitic conduct for centuries.

A recent study of the character of anti-Semitism observed that:

> "In medieval times hostility to the Jew, whatever its underlying social or psychological motivations, was defined primarily in religious terms. From the fifteenth century onward this was no longer true, and Jew hatred was redefined, becoming at first partly, and then, at least in theory, wholly racial."

B. Lewis, *Semites and Anti-Semites* 81 (1986). The predominantly racist content of anti-Semitism, from at least the time of the Spanish Inquisition through Nazi Germany to present-day America, is a matter of historical record. *See id.* at 26-33, 81-100; T. Gossett, *Race: The History of an Idea in America* 9-12, 292-93, 371-72, 449 (1963); *see also Shaare Tefila*, Pet. App. A, at 16a-17a (Wilkinson, J., dissenting); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 567 (E.D. Cal. 1982). Six million Jews were not murdered in the holocaust as a result of differences in religious doctrine; they were the victims of a twisted and avowedly racist Nazi ideology that measured Jewishness by blood rather than belief. Hence, application of the statute to Jews would not require a court to indulge the isolated racist idiosyncracies of individual defendants. The history of anti-Semitism amply, if not tragically, demonstrates its pervasive racist character.

Similarly, discrimination against Arabs has long assumed a decidedly racist cast. Arabs include natives of Near Eastern countries such as Syria, Egypt, Yemen, Lebanon, Iraq, and Saudi Arabia, and their descendants. Though Arabs are taxonomically classified as Caucasian, they often (though certainly not invariably) have a skin color darker than that of Caucasians of European descent. Bigots have seized upon Arabs' supposedly distinctive physical and ethnic qualities in stereotyping and discriminating against them. Examples of explicitly racist

anti-Arab epithets and conduct have surfaced with dismaying frequency in recent years.[8]

An obvious irony of the consolidation of these cases is that both Jews and Arabs fall within the crude rubric "Semite," which technically is a language classification, though it also has long had racial connotations. *See* G. Barton, *A Sketch of Semitic Origins* 28 (1902); B. Lewis, *Semites and Anti-Semites* 44-45, 50 (1986).[9] Racists, among others, have lumped Arab and Jew together as targets of discrimination. For example, a restrictive land covenant successfully challenged in the early 1970's forbade transfer " 'to any person of the Semitic *race*, blood or origin, which racial description shall be deemed to include Armenians, Jews, Hebrews, Persians and Syrians. . . .' " *Mayers* v. *Ridley*, 465 F.2d 630, 631 n.2 (D.C. Cir. 1972) (emphasis supplied). It is clear that bigots have historically treated Jews and Arabs—sometimes separately, sometimes together—as racially distinct from the "white" majority.

The test of the Fourth Circuit, which requires proof of *actual* membership in a separate "non-white" race, ignores the fact that discrimination against Caucasian sub-groups such as Arabs and Jews frequently assumes an undeniably racist quality. Racially-motivated discrimination against Arabs and Jews is no different in kind or character from the bigotry directed at taxonomically-

---

[8] *See, e.g.*, Dickey, *Falling Out of Love with the Arabs*, NEWSWEEK, Aug. 25, 1986, at 44 (describing a recent "surge of anti-Arab jingoism [and] increasing bigoted talk about 'camel jockeys' and 'sand niggers' "); Newell, *Arab-Bashing in America*, NEWSWEEK, Jan. 20, 1986, at 21.

[9] *See also* J. Worcester, *A Universal and Critical Dictionary of the English Language* 656 (Boston, Mass. 1874) (defining "Shemitic" as relating to various languages, including Arabic and Hebrew; defining "Shemitism" as "[t]he Shemitic race"). The term "Shemite" preceded that of "Semite," and is traceable to Shem, one of Noah's sons and the mythological forebear of the Shemites.

defined racial minorities. Adoption of a scientific "race test" would thus deny real victims of racist conduct an important remedy.[10]

Even if a "race test" arguably were appropriate for determining eligibility to invoke the Act, a restrictive, pseudo-scientific, color-based "race test" would be both improper and unseemly. In interpreting "race" for purposes of this civil rights law, even if the contemporary definition of race were not as broad as that at issue here, the correct approach would be to define the term and the statute as broadly as necessary to cover acts that are racial or racist in character. Both lay and scientific meanings admit to such sweeping applications.

It is commonly acknowledged that there is no definitional consensus in the scientific or academic community about "race." *See generally* A. Montagu (ed.), *The Concept of Race* (1964) (collecting various scholarly essays on topic); *see also United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 212 (1923); J. Barzun, *Race: A Study in Superstition* 203-07 (1965). Indeed, to the extent that there is agreement, it is on the proposition that the purpose of any racial classification dictates its scope and content. *See Ortiz* v. *Bank of America*, 547 F. Supp. 550, 565-67 (E.D. Cal. 1982); S. Molnar, *Races, Types, and Ethnic Groups* 13 (1975). In the lay community, "race" remains an extraordinarily open-ended concept; it is defined as broadly in today's leading dictionaries as it was over 100 years ago, when the Civil Rights Act was passed.[11]

---

[10] "Since the evil at which the statutes are aimed is discrimination, the scientific validity of the discriminator's racial definition is irrelevant." Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 678 (1975). In enforcing a statute designed to remedy racist conduct, the defendants' racist misperceptions must be considered, even if they are irrational and confused.

[11] *Compare Webster's Third New International Dictionary* 1870 (1981) ("descendants of a common ancestor" or "a class or kind of

Despite the fact that Arabs and Jews should *not* be classified as scientifically distinct "races," it is nonetheless true that each group has been considered to constitute a "race." The mistaken belief that Jews belong to a separate "race" is not only held by anti-Semites; many with benign attitudes towards Jews have referred to them as a "race." *See* A. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 353 (5th ed. 1974).[12] In fact, a standard dictionary in America still illustrates its definitions of "race" with unfortunate references to the "Hebrew race" and the "Jewish race." *Webster's Third New International Dictionary* 1870 (1981). *Cf.* N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) ("the Israelites are of the *race* of Abraham and Jacob") (emphasis in original).

Arabs are also popularly thought of as a separate "race." In terms that today would be regarded as racist,

---

individuals with common characteristics, interests, appearance, or habits") *with* N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) ("the series of descendants indefinitely").

[12] *See, e.g., Hirabayashi* v. *United States*, 320 U.S. 81, 111 (1943) (Murphy, J., concurring) (wartime treatment of Japanese Americans "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe."); *Near* v. *Minnesota*, 283 U.S. 697, 703 (1931) (Hughes, C.J.) ("Jewish Race"); I. Berlin, *Against the Current: Essays in the History of Ideas* 274-75 (1980) (describing Disraeli's theory of the "Jewish race"); G. Eliot, *Daniel Deronda* (1876) (sympathetic 19th Century fictional treatment of Jews laced with references to the "Jewish race"); Letter from Learned Hand to Charles H. Grandgent (Nov. 14, 1922) (urging that Harvard College not impose a "limitation based upon race" to restrict admission of Jews), *reprinted in* L. Hand, *The Spirit of Liberty* 21 (3d ed. 1974); *The Sun* (New York), Sept. 19, 1870, at 2, cols. 2-3 ("The Jews are not merely a church; they are a race. . . . The Jewish race is one of the most tenacious and strongly marked in all the history of man."), *reprinted in* M. Schappes (ed.), *A Documentary History of the Jews in the United States* 541 (3d ed. 1971).

a district court opinion dating back several decades soberly analyzed the group characteristics of Arabs and concluded that "as a class they are not white" and would not have been considered "white" by the Congress that enacted this country's first naturalization statute in 1790. *In re Hassan*, 48 F. Supp. 843, 845-46 (E.D. Mich. 1942). *But see Ex parte Mohriez*, 54 F. Supp. 941 (D. Mass. 1944). The notion that Arabs constitute a distinct race is not a new or novel one. *See* R. Benedict, *Race and Racism* 13 (1942) (describing different groupings of the Arab race).

While most racial labelling is misguided, the reality is that Arabs, Jews, and many other ethnic or minority groups have been widely, though erroneously, regarded as belonging to "races." Such beliefs merely reflect the way "race" has been understood from at least the 19th Century to this day in popular and even academic parlance. In the face of such open-ended understandings of "race" and the express purpose of the statute to remedy all racially-motivated acts of discrimination, a construction of the statute that seeks to limit its coverage to scientifically-verifiable "non-white races" is a misguided enterprise. Moreover, such an abstract and restrictive reading of the statute would leave countless victims of discrimination plainly racist in character without any effective remedy. The correct result is to apply the statute to all victims of racially-motivated discrimination and to avoid formulation of a technical "race test."

A restrictive reading of the statute—one which ignores the racial motivations of defendants and the broader understandings of "race" prevalent at the time of the Act or in some modern lay usage—would require the federal courts to devise such a "scientific" definition of "race" and to assume the role of arbiter of racial classifications. It could result in unseemly judicial inquiries into the racial background of litigants and the formula-

tion of artificial and technical racial distinctions.[13] The breadth of the statute, however, renders such a definitional role unnecessary because of its sweeping prohibition of all racially-motivated discrimination. This Court therefore should reject the color-based, "scientific" test of the Fourth Circuit panel below and make it clear that a plaintiff need not "prove his [racial] pedigree," *Saint Francis College*, Pet. App. at 26a, before he is permitted to invoke a statute that by its terms protects "all persons."

III. Section 1981 and 1982 Plaintiffs Should be Permitted to Proceed With Their Claims Unless Their Allegations Are Clearly Inconsistent With the Possibility That They Were the Victims of Racial Discrimination.

The central flaw of the Fourth Circuit's decision in *Shaare Tefila* is that it dismissed the Congregation's claim in the teeth of allegations of conduct that was unmistakably racial or racist in character. The defendants conceded that they believed Jews to constitute a separate and inferior non-white race. They desecrated plaintiffs' synagogue with anti-Semitic emblems redolent of racially-inspired Jew hatred. Moreover, Jews, though members of a religion, for centuries and to this day commonly have been thought of, albeit mistakenly, as a separate "race."

The correct rule of law at the pleading stage should be that allegations which, if proven, would establish discrimination that is racial in character are adequate to state a cause of action. In light of the purpose of the

---

[13] *See* Note, *Legal Definition of Race*, 3 RACE REL. L. REP. 571 (1958) (reviewing statutory definitions of racial groups and judicial interpretations thereof, particularly as applied in the miscegenation context); *compare United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 209-15 (1923) (high caste Hindu not a "free white person" for naturalization purposes) *with In re Mohan Singh*, 257 F. 209 (S.D. Cal. 1919) (reaching opposite result apparently undermined by the *Thind* case).

statute to combat racial discrimination in its various forms and the open-ended and imprecise meanings of "race" since 1866, it would be improper to screen potential plaintiffs by requiring allegations of membership in a "non-white race." The better approach would be to require only allegations of discrimination of a racial character.[14]

There are numerous factors—none of which is exclusive—that the courts should consider in determining whether a plaintiff has adequately pleaded and can plausibly assert that he was the victim of *racial* discrimination, as opposed to discrimination on some other basis not prohibited by the statute. The factors to be considered should include the plaintiff's allegations concerning the racial or racist motivations of the defendant. In addition, the court should weigh the plaintiff's allegations regarding his own race or skin color. Equally important factors are the extent to which the plaintiff belongs to an identifiable group that is commonly or historically regarded by bigots or lay persons as constituting a "race," as the term is understood in a broad sense. Unless the plaintiff's allegations are inconsistent with the notion that he or she has suffered discrimination that is racial or racist in character, a cause of action has been stated and the plaintiff should be entitled to prove his or her claim.[15]

---

[14] Because the Arab and Jewish plaintiffs in these cases allege racial discrimination, the Court need not determine the extent to which the statute protects individuals claiming discrimination *solely* on the basis of national origin, *cf. Delaware State College* v. *Ricks*, 449 U.S. 250, 256 n. 6 (1980) (reserving question), or some other criterion.

[15] Numerous courts and commentators endorse an approach that goes beyond the "scientific" racial status of the plaintiff and includes inquiry into one or more additional factors, such as those described above, that are relevant to the racial character of discriminatory conduct. *See Alizadeh* v. *Safeway Stores, Inc.*, 802 F.2d 111, 114-15 (5th Cir. 1986); *Saint Francis College*, Pet. App. at

The test proposed is flexible and directs the court's attention to any and all factors relevant to the existence of racial discrimination. It recognizes that the racial status of the victim is not the only measure of racism. This test would also relieve the courts of the impossible and unseemly task of analyzing in a pseudo-scientific fashion the "races" of litigants. In short, it would acknowledge the true nature of racism and afford the statute's protection to all victims of racial discrimination. By any measure, the Arab and Jewish plaintiffs in these cases have pleaded discrimination that is racial in character.

CONCLUSION

For the foregoing reasons, the *amici* urge this Court to reverse the decision of the Fourth Circuit below, to affirm the ruling of the Third Circuit below, and to resolve these cases in a manner making clear that the Civil Rights Act of 1866 is available to all Arab and Jewish victims of racial discrimination.

25a-27a; *Erebia* v. *Chrysler Plastic Prod. Corp.*, 772 F.2d 1250, 1253-54 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1197 (1986); *Ramos* v. *Flagship International, Inc.*, 612 F. Supp. 148, 151 (E.D.N.Y. 1985); Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975). Other authorities maintain that there is no "racial" requirement and that virtually any victim of group-based discrimination may invoke the Act. *See Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968, 971-72 (10th Cir. 1979); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 568 (E.D. Cal. 1982); Note, *National Origin Discrimination Under Section 1981*, 51 FORDHAM L. REV. 919, 939, 942 (1983).

Respectfully submitted,

GREGG H. LEVY *
MITCHELL F. DOLIN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000
Counsel for Amici Curiae

Of Counsel:

MICHAEL SCHULTZ
MEYER EISENBERG
DAVID BRODY
EDWARD N. LEAVY
STEVEN M. FREEMAN
JILL L. KAHN
ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH
823 United Nations Plaza
New York, New York 10017
(212) 490-2525
and
1640 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 857-6660

MENACHEM Z. ROSENSAFT
INTERNATIONAL NETWORK
OF CHILDREN OF JEWISH
HOLOCAUST SURVIVORS
425 Park Avenue
New York, New York 10022
(212) 407-8000

ROBERT S. RIFKIND
SAMUEL RABINOVE
RICHARD T. FOLTIN
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, New York 10002
(212) 751-4000

EILEEN KAUFMAN
INSTITUTE OF
JEWISH LAW
300 Nassau Road
Huntington, New York 11743
(516) 421-2244

HAROLD R. TYLER
JAMES ROBERTSON
NORMAN REDLICH
WILLIAM L. ROBINSON
JUDITH A. WINSTON
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

RACHAEL PINE
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

JOSEPH A. MORRIS
CAPITAL LEGAL COUNCIL
OF B'NAI B'RITH
5500 Friendship Boulevard
Chevy Chase, Maryland 20815

GROVER G. HANKINS
JOYCE H. KNOX
NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF
COLORED PEOPLE
4805 Mount Hope Drive
Baltimore, Maryland 21215
(301) 358-8900

November 1986

* Counsel of Record